No. 02-376

In the
Supreme Court of the United States

BRIAN VICTOR MYRLAND AND
MARK ROBERT NORLANDER,

Petitioners,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

The Respondent hereby objects to the Petitioners' question presented as phrased in their Writ of Certiorari. If review is granted, the question presented is whether the affirmative defense set forth in Minn. Stat. §617.247, subd. 8 violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

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BRIEF IN OPPOSITION

The State of Minnesota ("Respondent") submits its Opposition to the Petition for Writ of Certiorari filed by Petitioners, Brian Victor Myrland and Mark Robert Norlander ("Petitioners") to review the judgment of the Minnesota Court of Appeals. For the reasons set forth herein, the Petition should be denied because there are no compelling reasons for further appellate review.

STATEMENT OF FACTS

A. State v. Myrland.

On May 18, 2001, an official for Minnesota Independent School District 196 reported to Investigator Mike Pritzlaff of the Apple Valley, Minnesota, Police Department that the school district suspected a schoolteacher, identified as Brian Victor Myrland, of downloading and printing pornography off the Internet from his classroom computer. The school district conducted a search of Myrland's classroom. In doing so, school officials found numerous pornographic works of males that appeared to be under 18-years-old. The school district provided to Investigator Pritzlaff, copies of said pornographic works and Pritzlaff began an investigation of the matter.

During interviews with school officials and Investigator Pritzlaff, Myrland admitted that he had been accessing pornographic web sites on his classroom computer and five other computers located in the school. Myrland stated that he would save into computer folders, pictures from the pornographic web sites. Myrland further stated that he would subsequently print some of the pictures and take them home. Myrland admitted that he began accessing the

pornographic web sites during the 1999/2000 school year and continued until the discovery of his activities in May 2001.

The hard drives of the computers identified by Myrland as being the ones he used to access the pornographic web sites were obtained and searched by the Minnesota Bureau of Criminal Apprehension. During the search, numerous images were found of males who appear to be under the age of 18, engaged in sexual conduct.

B. State v. Norlander.

On December 22, 2000, an agent of the St. Paul, Minnesota, Police Department contacted Detective Manila Shaver of the West St. Paul Police Department, to notify him that they were conducting an investigation into efforts by Mark Robert Norlander, a West St. Paul resident, to make contact with minor boys for sexual purposes. Detective Shaver learned that a special agent in the Wisconsin Department of Justice, posing as a 14 year-old boy, had developed in Internet relationship with Norlander. During their numerous Internet communications, Norlander had proposed arranging a meeting with the "boy" to engage in sexual activity. The meeting was set for December 21, 2000, in Eau Claire, Wisconsin. Norlander arrived at the prearranged time and location and was taken into custody and charged by Wisconsin authorities. Based upon the information obtained in the Wisconsin investigation, a search warrant was prepared for Norlander's residence in West St. Paul. The search was executed on December 22, 2000, and officers seized a number of items from Norlander's home, including a computer. When talking with investigators, Norlander admitted that his computer might contain images of minors engaged in sexual activity. When the officers viewed the contents of the hard drive from Norlander's computer,

they found a number of pictures of minor boys engaged in sexual activities.

The Petitioners were separately charged by complaint with one count of Possession of Pictorial Representations of Minors in violation of Minn. Stat. §617.247, subd. 4. The Petitioners moved the trial court to dismiss their respective complaints arguing that the statute was unconstitutional. Specifically, the Petitioners alleged that: (1) the affirmative defense contained in Minn. Stat. §617.247, subd. 8 violated the Due Process Clause of the United States Constitution because it shifts to the defendant, the burden of proof of an essential element of the crime; (2) Minn. Stat. §617.247, subd. 4 contained no *mens rea* element; and (3) Minn. Stat. §617.247, subd. 4 was overbroad and violative of the First Amendment of the United States Constitution.

Contested omnibus hearings were held in each case. By separate orders dated December 14, 2001, the trial court dismissed the complaints in both cases finding that the affirmative defense contained in Minn. Stat. §617.247, subd. 8 violated the Due Process Clause of the United States Constitution by impermissibly shifting to the defendant, the burden of proof of an essential element of the crime. The trial court rejected the Petitioners' remaining constitutional challenges.

The Respondent appealed the trial court's decision to the Minnesota Court of Appeals. In an opinion filed on June 4, 2002, the Minnesota Court of Appeals reversed the trial court's decision. The Petitioners subsequently filed a Petition for Review with the Minnesota Supreme Court. By an order dated August 6, 2002, the Minnesota Supreme Court denied discretionary review.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. THE MINNESOTA COURT OF APPEALS' DECISION IS IN ACCORD WITH LONG STANDING SUPREME COURT AND MINNESOTA SUPREME COURT PRECEDENT.

The Petitioners were separately charged by complaint with one count of Possession of Pictorial Representations of Minors in violation of Minn. Stat. §617.247, subd. 4. That statute provides:

> Subd. 4. Possession prohibited. A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than three years and a fine of not more than $5,000 for a first offense and for not more than five years and a fine of not more than $10,000 for a second or subsequent offense.

Minn. Stat. §617.247, subd. 4. An affirmative defense to the crime is contained in Minn. Stat. §617.247, subd. 8 which provides:

> Subd. 8. Affirmative defense. It shall be an affirmative defense to a charge of violating this section that the pornographic work was

> produced using only persons who were 18 years or older.

Minn. Stat. §617.247, subd. 8.

The Petitioners challenged the constitutionality of Minn. Stat. §617.247, subd. 8 arguing that it violated the Due Process Clause. Specifically, the Petitioners maintained that the affirmative defense shifts to a defendant, the burden of proof of an essential element of the offense; namely, that the defendant must prove that the photographic subjects are adults.

It is well-settled law that due process requires the state to prove, beyond a reasonable doubt, every fact necessary to constitute the crime with which a defendant is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 281 (1977) and Patterson v. New York, 432 U.S. 197, 204, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The law enunciated by this Court in Winship and Patterson was adopted by the Minnesota Supreme Court in a series of cases dating back to 1983. (*See* State v. Charlton, 338 N.W.2d 26 (Minn. 1983), State v. Auchampach, 540 N.W.2d 808 (Minn. 1995), and State v. Hage, 595 N.W.2d 200 (Minn. 1999)).

Once the state has met its burden, the state may impose upon a defendant the burden of proving by a preponderance of the evidence that his conduct should be excused by some mitigating circumstance or issue. Patterson, 432 U.S. at 209. If, however, the mitigating circumstance or issue disproves or negates an element of the crime charged, a defendant cannot be required to shoulder the burden of persuasion for his proffered defense. Patterson, 432 U.S. at 206-8. If a defendant were required to bear this burden, it would violate due process by impermissibly shifting to the defendant the burden of disproving the existence of an

element of the crime charged. Id. The Minnesota Supreme Court has held that, "if the mitigating circumstance or issue disproves or negates an element of the crime charged, the greatest burden a state may impose upon a defendant is that of shouldering the burden of production." Hage, 595 N.W.2d at 205. "In such cases, a defendant must make a prima facie showing that the proffered defense is an issue in the case, with the burden then shifting back to the state to prove beyond a reasonable doubt the lack of the defense." Id., citing Auchampach, 540 N.W.2d at 817 (citing State v. Charlton, 338 N.W.2d 26, 30-31 (Minn. 1983)); 1 LaFave & Scott, Substantive Criminal Law §1.8(b), at 68-71.

Here, a plain reading of the applicable statutes demonstrates that Minn. Stat. §617.247, subd. 8 does not violate the Due Process Clause of the United States Constitution. Minn. Stat. §617.247, subd. 4 prohibits a person from possessing a "pornographic work" or any computer component containing a "pornographic work," knowing or with reason to know it's content and character. The term "pornographic work" is defined as follows:

> (1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or
>
> (2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that:
>
> > (i) uses a minor to depict actual or simulated sexual conduct;

> (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or
>
> (iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.
>
> For the purpose of this paragraph, an identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction.

Minn. Stat. §617.246, subd. 1(f). The term "minor" means any person under the age of 18. Minn. Stat. §617.246, subd. 1(b).

Relying upon long standing precedent, the Minnesota Court of Appeals correctly held that the state has the burden of proving, as part of its case in chief, that the subject depicted in the pornography is a minor. Furthermore, the Minnesota Court of Appeals correctly held that even if the defense is asserted, the defendant would only be required to make a prima facie showing that the age of the person is an issue in the case, after which, the burden would shift back to the state to prove beyond a reasonable doubt the lack of the defense. In other words, a defendant only has the burden of production rather than the burden of persuasion if he wishes to assert the affirmative defense contained in Minn. Stat. §617.247, subd. 8.

The Petitioners assert that a defendant should never be required to shoulder the burden of production on an

affirmative defense, arguing that it violates the Due Process Clause. The Petitioners cite no applicable case law in support of their position. If the Petitioners' argument were adopted, all affirmative defenses would violate the Due Process Clause. The Petitioners' reasoning is in direct conflict with this Court's holdings in Winship and Patterson.

Rather than shift the burden of an element of the offense to the defendant, the affirmative defense aids the defendant by limiting the reach of the statute. For example, there may be a situation in which the defendant produced what appears to be pornographic work using adults made to look as if they are minors. If the defendant was charged under Minn. Stat. §617.246 for using minors to produce a pornographic work, he would have available to him, the affirmative defense that he used individuals 18 years or older to produce the work. *See* Minn. Stat. §617.246, subd. 6. Likewise, if the same defendant was charged with possessing the same alleged pornographic work under Minn. Stat. §617.247, subd. 4, he would still have the affirmative defense available to him. *See* Minn. Stat. §617.247, subd. 8. If the affirmative defense did not exist for the possession charge, an anomaly would be created under the above set of facts.

The decision issued by the Minnesota Court of Appeals comports with Winship, its progenies, and Minnesota case law. As such, there is no compelling reason for further appellate review.

II. THE MINNESOTA COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ASHCROFT V. FREE SPEECH COALITION.

In support of their Writ of Certiorari and affirmative defense argument, the Petitioners suggest that the decision

issued by the Minnesota Court of Appeals is in conflict with this Court's holding in Ashcroft v. Free Speech Coalition, 535 U.S. ____, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). In Free Speech Coalition, this Court struck down the elements of the federal Child Pornography Protection Act that criminalized the possession, distribution or creation of "virtual" child pornography. This Court held that the portions of the statute criminalizing "virtual" child pornography violated the First Amendment as being overbroad.

In their Writ of Certiorari, the Petitioners misrepresent this Court's holding in Free Speech Coalition by suggesting that this Court held that it was unconstitutional to include an affirmative defense in the federal child pornography statute. The Petitioners quoted partial language from the decision in which this Court responded to an argument made by the Government. The Government argued that the statute did not violate the First Amendment because of the existence of an affirmative defense that allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. The Petitioners cited the following language from the Free Speech Coalition opinion:

> The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the

> identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.

Free Speech Coalition, 122 S.Ct. at 1404.

This Court, however, went on to state:

> We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the

> use of adult actors who appear to be minors. In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.

Free Speech Coalition, 122 S.Ct. at 1405.

The Free Speech Coalition case does not prohibit the inclusion of affirmative defenses in child pornography statutes. As noted by Justice Thomas in his concurring opinion, the Court left "open the possibility that a more complete affirmative defense could save a statute's constitutionality. . . ." Free Speech Coalition, 122 S.Ct. at 1407. In fact, in his concurrence, Justice Thomas stated that in the event technology evolves "to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children," then "the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction." Free Speech Coalition, 122 S.Ct. at 1406. Contrary to the Petitioners' argument, the Free Speech Coalition decision actually supports the inclusion of the affirmative defense to possession of child pornography offenses contained in Minn. Stat. §617.247, subd. 8.

The Petitioners misrepresented the holding in Free Speech Coalition. The holding in that case only addressed First Amendment overbreadth issues concerning the elements

of the federal Child Pornography Protection Act that criminalized "virtual" child pornography. The Free Speech Coalition case has no applicability to the issue presented in the case at hand.

CONCLUSION

The Petitioners have failed to set forth any compelling reasons for further appellate review. Based on the foregoing, Respondent respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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